Calls for Legislative Action

Case Name	Summary of the Case	Call for Legislative Action	Statute
Rutherford v. Talisker Canyons Finance, Co., 2019 UT 27, 445 P.3d 474	Minor was injured when he skied into machine-made snow at Canyons Ski Resort. Minor's parents brought claims for negligence against Canyons Ski Resort. In the district court, Canyons Ski Resort argued that the claims were barred by the machine-made snow exemption in Utah's Inherent Risks of Skiing Act ("the Act"). The district court decided that, under the Utah Supreme Court's decision in *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991), there was still a question of whether the claims were barred by the Act. In *Clover*, the Utah Supreme Court concluded that the list of risks in the Act did not categorically bar injuries caused by a listed risk. Rather, the Court held that a court must determine: 1) whether an injury was a result of a risk that the skier wished to confront; and 2) if the injury is not a risk that the skier wished to confront, whether the ski resort took reasonable care to remedy the risk. Canyons Ski Resort appealed the district court's decision. The Utah Supreme Court agreed to hear Canyon Ski Resort's appeal on two issues, one of those issues was whether the Court should continue to follow *Clover's* interpretation of the Act. In *Rutherford*, the Utah Supreme Court clarifies *Clover*, holding that a court should make an objective determination of whether a skier reasonably expects to encounter a risk while skiing. If the skier expects to encounter the risk, then the risk is an integral part of the sport of skiing and is an inherent risk of skiing. Justice Thomas Lee dissented, arguing that the case law has distorted the terms of the Act. He stated that he would read the listed risks in the Act as categorically included as inherent risks. Justice Lee states, " I would credit the text of the Inherent Risks of Skiing Act. I would overrule *Clover,* and in so doing affirm that our job is to interpret statutes, not rewrite them. *Rutherford*, 2019 UT 27, ¶ 198.	In the majority decision, Justice Deno Himonas states: "The legislature, of course, retains the power to amend the Act and overrule our interpretation, which it has thus far declined to do. To the extent our current holding is not in line with the legislature's actual intent, 'we [continue to] invite the Utah Legislature to revisit the [Act] to provide clarity in this area.'" *Rutherford v. Talisker Canyons Finance, Co.*, 2019 UT 27, ¶ 84.	Title 78B, Chapter 4, Part 4, Inherent Risks of Skiing

State v. Newton, 2020 UT 24, -- P.3d --.	Defendant was charged with rape. At trial, the district court gave the following jury instruction: "Rape as defined in the law means the actor knowingly, intentionally, or recklessly has sexual intercourse with another without that person's consent." *Newton*, 2020 UT 24, ¶ 10. Defendant's counsel did not object to this jury instruction and Defendant was convicted of aggravated sexual assault. On appeal, Defendant argued that his counsel failed to make sure that the jury was "clearly and accurately instructed about consent" in the jury instruction. *Newton*, 2020 UT 24, ¶ 22. The Utah Court of Appeals held that the jury instruction on rape accurately identified each element of rape and correctly stated each mental state. However, the Utah Supreme Court stated that the jury instruction was more ambiguous than the Court of Appeals held because the jury instruction could have more clearly stated that the defendant acted with intent, knowledge, or recklessness that the victim did not consent. Regardless, the Court held that Defendant did not establish that the ambiguous jury instruction would have led a jury to acquit him of the charges. Justice Paige M. Petersen concurred, but wrote separately. In general, the rape statute does not specify a required mental state or a specific mental state for as to a victim's nonconsent. Utah Code section 76-2-102 provides "when the definition of the offense does not specify a culpable mental state and the offense does not involve strict liability," then "intent, knowledge, or recklessness shall suffice to establish criminal responsibility." Justice Petersen explained that knowledge and recklessness are compatible with victim consent because a prosecutor must prove either that: "(1) the defendant knew that the victim did not consent"; or "(2) the defendant was reckless as to whether the victim did not consent." Newton, 2020 UT 24, ¶ 53. But intent is not compatible with the element of victim nonconsent because victim nonconsent requires the prosecution to prove that the victim did not consent, and that the defendant was aware that the victim did not consent.	Justice Paige M. Petersen, concurring: "I agree with the committee that "intent" is incompatible with the mens rea for the victim's nonconsent. However, I concur with the majority opinion on this point because I conclude that Utah Code section 76-2-103(2) does not give us the freedom to exclude "intent" of our own accord in element four. I write separately to raise this issue, however, for possible refinement by the legislature if it so chooses." *Newton*, 2020 UT 24, ¶ 57.	Subsection 76-2-103(2) (Mens Rea); Section 76-5-402 (Rape)

State v. Bridgewaters, 2020 UT 32, -- P.3d --.	Defendant was charged with violating a protective order, which had been mailed to Defendant's last known address. The district court found that there was a probable cause for the charges and bound Defendant over for trial. Defendant filed a motion to overturn this decision, arguing that he had not been properly served with the protective order in accordance with Rule 4 of the Utah Rules of Civil Procedure and that a previously issued ex parte protective order had expired. The district court denied Defendant's motion. Defendant appealed the district court's decision. One of the issues before the Utah Supreme Court was whether Rule 4 of the Utah Rules of Civil Procedure governs service of a protective order. The Court determined that, given the use of the phrase, "service of process," for protective orders in the Cohabitant Abuse Act, the Legislature intended protective orders to be served in accordance with Rule 4. However, even though the Court determined that the protective order was not served in accordance with the Act, the Court determined that there was an ex parte protective order still in effect, which had been personally served on Defendant. In a footnote, the Court explains that Article VIII, Section 4, of the Utah Constitution grants the Utah Supreme Court authority to adopt rules of procedure and the Legislature authority to amend those rules upon a 2/3rds vote of both houses. The Court states that the Cohabitant Abuse Act contains unique procedure rules that "purport to supersede the Utah Rules of Civil Procedure where applicable," but the Legislature did not enact those provisions in accordance with the Utah Constitution. *Bridgewaters*, 2020 UT 32, ¶ 24 n.9. Although the State had not challenged the constitutionality of the Act, the Court stated that there is a "practical concern" with the Act taking precedence over the rules. Essentially, "[i]n protective order proceedings, litigants and courts are faced with two sets of procedural rules running on parallel tracks and are required to make judgment calls about which rule should apply in a given circumstance." *Bridgewaters*, 2020 UT 32, ¶ 24 n.9.	In the majority opinion, Justice Petersen states: "Aside from any constitutional concerns, the Legislature could increase clarity for the bar and the bench if it were to enact rule changes through joint resolutions that specifically amend the relevant rule of procedure." *Bridgewaters*, 2020 UT 32, ¶ 24 n.9.	Subsection 78B-7-106(13); Section 78B-7-118